August 2014

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

Foreword

I am pleased to enclose the August 2014 issue of FICCI's Tax Updates. This contains recent case laws, circulars and notifications pertaining to direct and indirect taxes.

A Memorandum containing FICCI's recommendations on tax proposals announced in the Union Budget 2014-15 was compiled based on inputs received from the constituents and submitted to the Government on July 21, 2014. The Finance Bill has since been enacted as Finance Act (No.2), 2014, by adopting changes in some of the original proposals.

On the taxation regime, the Income Tax Appellate Tribunal in the case of GFA Anlagenbau Gmbh held that supervisory services rendered by the taxpayer through foreign technicians do not constitute a Permanent Establishment (PE) of the taxpayer in India under the India-Germany tax treaty. The taxpayer, a German company, was primarily engaged in the activity of supervision, erection and commissioning of plant and machinery for steel and allied plants. The Tribunal held that since the taxpayer rendered services at project sites of its clients and does not own or operate such sites independently, it cannot be construed that the taxpayer has a fixed place of business in India. The Tribunal held that income from supervisory services would be taxed as fees for technical services.

In a Central Excise matter, the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) observed that CENVAT Credit Scheme adopted and operationalized in India relies upon the sanctity of documents. It held that in order to claim CENVAT Credit, substantial compliance of law is not enough; prescribed statutory procedures should mandatorily be followed.

In another judgment, the Delhi bench of CESTAT held that the land under which pipelines for transporting crude oil were laid cannot be said to be the precincts of an oil refinery for the purpose of definition of 'factory' under Section 2(e) of the Central Excise Act, 1944. It declined the request of the refinery to include certain parts of the land area in and around the refinery under which the pipelines were laid as part of the factory.

We do hope that this newsletter keeps you updated on the latest tax developments.

We would welcome any suggestions to improve the content and the presentation of this publication.

A. Didar Singh

Recent Case laws

I. DIRECT TAX

High Court Decisions

Limitation period is applicable to Tax Deduction at Source orders under Section 201(1)/(1A) of the Act, even though no time limit prescribed under the Act for subject assessment year

During assessment proceedings, the AO observed that the payments to lead managers were in the nature of FTS covered under Section 9(1)(vii) of the Act and hence were liable for deduction of tax at source. In absence of deduction of tax at source, the taxpayer was treated as an assessee in default under Section 201(1) of the Act, and interest under Section 201(1A) was also charged. On appeal, the Commissioner of Income-tax (Appeal) [CIT(A)] substantially upheld the AO's order. On appeal before the Tribunal, the taxpayer raised an additional ground that the AO's order was void-ab-initio as it was barred by limitation.

The tax department made an application before the learned President of Income Tax Appellate Tribunal (the Tribunal) for constitution of a Special Bench under Section 255(3) of the Act for consideration of the issue of limitation which was raised by the taxpayer as an additional ground. This request of the Revenue was accepted and the learned President constituted a Special Bench. The Tribunal held that the reasonable time for initiating and completing the proceedings under Section 201(1) had to be at par with the time limit available for initiating and completing the reassessment, as the assessment includes reassessment. Aggrieved by the Order of Tribunal, the tax department preferred an appeal before the Bombay High Court. After perusing Section 201(1) and Section 201(1A), the Bombay High Court held that though Section 201 did not prescribe any limitation period for a taxpayer being declared as an assessee in default, the tax department will have to exercise the powers in that regard within a reasonable time. The Bombay High Court relied on the decisions of Delhi High Court in the case of CIT v. NHK Japan Broadcasting Corporation [2008] 305 ITR 137 (Delhi) and CIT v. Hutchison Essar Telecom in [2010] 323 ITR 230 (Delhi) and refused to follow the Calcutta High Court ruling in Bhura Exports Ltd. v. ITO [TS-517-HC-2011(CAL)] in which it was held that a period of limitation was inapplicable to Section 201 orders. The High Court dismissed the departmental appeal, stating that the appeal does not raise any substantial question of law.

DIT v. Mahindra & Mahindra Limited [TS-404-HC-2014(BOM)]

Liabilities recorded by way of journal entries clearly outside the scope of Section 269SS of the Act

The taxpayer filed its return of income for Assessment Year (AY) 2007-08. The AO found that the taxpayer had shown purchases of land worth INR142.2 million, which were reflected as closing stock in trade. The taxpayer had also reflected a sum of Rs.142.5 million as Sundry Creditors. The taxpayer contended that the Sundry

Creditor reflected in its books was M/s PACL India Ltd., which had purchased lands on behalf of taxpayer from several landowners. M/s PACL India Ltd. had made payments through demand drafts to various landowners from whom the land was acquired on behalf of the taxpayer. The AO concluded that the transaction amounted to a loan given by the M/s PACL to the taxpayer. The AO also held that there was a contravention of provisions of Section 269SS/T of the Act, as the loan was not paid through an account payee cheque. The AO levied a penalty under Section 271D for alleged violation of the provisions of Section 269SS/T of the Act. The CIT(A) confirmed the penalty. On further appeal, the Tribunal had held that the penalty order passed by the AO under Section 271D of the Act was unsustainable, as it was passed beyond the period of six months as prescribed under Section 275(1)(c) of the Act.

Before the Delhi High Court the tax department contended that for the penalty order under Section 271D of the Act, the time limit prescribed under Section 275(1)(a) of the Act is applicable. The High Court observed that the penalty sought to be imposed on the taxpayer is for alleged violation of Section 269SS of the Act which is independent of the assessment. The action inviting imposition of penalty is the granting of loans above the prescribed limit otherwise than through banking channels, and as such infringement of Section 269SS of the Act is not related to the income that may be assessed or finally adjudicated. The High Court thus concluded that time limit prescribed under Section 275(1)(a) of the Act would not be applicable and the provisions of Section 275(1)(c) would be attracted. For this proposition the High Court referred to the decision of Rajasthan High Court in the case of CIT v. Hissaria Bros [2007] 291 ITR 244 (Raj.). The High Court also observed that the liability recorded in the books of accounts by way of journal entries, i.e. crediting the account of a party to whom monies are payable or debiting the account of a party from whom monies are receivable in the books of accounts, is clearly outside the ambit of the provision of Section 269SS of the Act, because passing such entries does not involve acceptance of any loan or deposit of money. Hence there is no infringement of Section 269SS of the Act. For this proposition the High Court relied on the decision of Delhi High Court in the case of CIT v. Noida Toll Bridge Co. Ltd [2003] 262 ITR 260 (Delhi HC).

CIT v. Worldwide Township Projects Ltd. [TS-395-HC-2014(DEL)]

High Court dismisses taxpayer's writ petitions challenging reopening notice and AO's order passed in response to taxpayer's objections against reopening

The taxpayer had filed several writ petitions before Madras High Court under Article 226 of the Constitution, challenging the reopening notice under Section 147/148 of the Act in a few cases and the speaking order passed by the AO on the objections raised by taxpayer in other cases.

The Madras High Court held as follows:

- A challenge to an order passed on the objections of the taxpayer is in effect a challenge to a notice under Section 148 of the Act. Such an order passed by the AO is only at the stage of process of determination and is not a determination by itself. A writ can be filed to the limited extent in cases

FICCI

where an assessment is sought to be reopened by an Officer who is not competent to do so, or where on the face of it, it would appear that the reopening is barred by limitation or lacks inherent jurisdiction i.e. cases where no adjudication is required on facts (CIT v. Chhabil Dass Agarwal [2013] 357 ITR 357 followed);

- As held in GKN Driveshafts v. ITO [2003] 259 ITR 19 (SC), once a notice under Section 148 is issued, the taxpayer has to file a return and can seek the reasons for issuing notice. The AO is bound to furnish the reasons within a reasonable time and the taxpayer is entitled to file objections over which the AO has to pass a speaking order. The Supreme Court has indicated that the taxpayer is not required to run to the Court before the passing of the assessment order by challenging a notice issued under Section 148 of the Act. Decision in the case of GKN Driveshafts has to be understood to mean that pre-adjudication proceedings not deciding the issues shall not be put into challenge while exercising the discretionary power under Article 226 of the Constitution of India, which, in the process, takes away the right of the AO to proceed further. Such a preliminary order, which does not have a statutory flavour not deciding the dispute between the parties, cannot be challenged by invoking the extraordinary jurisdiction.

- The decision of the Supreme Court in the case of Calcutta Discount Co. Ltd [1961] 41 ITR 191 (SC) that was rendered much prior to the decision in the case of GKN Driveshafts. Further, the situation at the time of rendering the said judgment is no longer in existence today.

- Considering the scheme of the enactment, particularly with reference to Sections 147 to 153 of the Act, an order passed on the objections of the taxpayer over adjudicating facts is not open to challenge by way of filing a writ petition.

JCIT v. Kalanithi Maran [TS-413-HC-2014(MAD)]

The Delhi High Court upheld the Tribunal's ruling that trading intermediary ('Sogo Shosha' in Japanese context) is akin to trading activities, not provision of service

The taxpayer is a wholly owned subsidiary of Mitsubishi Corporation (MC) Japan, which is one of Japan's leading 'Sogo Shosha' or general trading companies. The taxpayer in this case was engaged in import of products from associated enterprises, and further resale. The taxpayer contended that it effectively performs as a provider of support services to the 'Sogo Shosha' activities of MC, Japan. The TPO adopted operating profit/total cost as the Profit Level Indicator (PLI) to review the arm's length nature of transactions, wherein the total cost was computed, including cost of goods sold, as the TPO and the DRP were of the view that the transactions in question were trading transactions.

The Tribunal held that both purchases and sales made by the taxpayer are recorded in its books of accounts. The title of goods is held by the taxpayer for some time and transactions were done on a principle to principle basis. Such activity cannot be

FICCI

bracketed with that of a commission agent or a broker. Thus, the activities in question are akin to trading activities. Further, the Tribunal held that the comparables in this case have not been selected keeping in view the functional profile of a trading entity. Both the taxpayer and the TPO have benchmarked the transactions by using comparables which have the functional profile of a service provider. The Tribunal set aside the issue to the file of the AO for fresh adjudication in accordance with the law. Aggrieved, the taxpayer filed an appeal at the High Court.

The High Court held as follows:

- The Tribunal had concluded that the taxpayer's activities were in the nature of trading as such transactions are entered into on a principal to principal basis and cannot be considered the activities of a commission agent/broker. The High Court held that it found no infirmity with the reasoning of the Tribunal.

- Regarding the taxpayer's apprehension that in view of the findings of the Tribunal, the taxpayer is likely to be treated as an ordinary trader and compared with other traders who may not be similarly situated, the High Court did not find any grounds for such apprehension as the Tribunal had made it clear that appropriate comparables would have to be considered for determination of ALP i.e. entities which are similarly placed as the taxpayer, including in respect of their functional and risk profile as well as working capital exposure, would be chosen as comparables. The High Court found no reason to interfere with the order of the Tribunal, and dismissed the appeal of the taxpayer.

Mitsubishi Corporation India Private Limited v. ACIT [(ITA No 322/2014) Delhi High Court (AY 2006-07)]

Tribunal Decisions

Supervisory services not connected with the building, construction and assembling activity, in itself does not constitute a PE in India

The taxpayer, a German company, was primarily engaged in the activity of supervision, erection, and commissioning of plant and machinery for steel and allied plants. The taxpayer entered into an agreement with certain Indian companies for supervision, erection, ramping-up, commissioning, demonstration of performance, performance guarantee test, etc. of various 'plant and machinery' for their steel and allied plants.

The receipts from the aforesaid services were offered to tax as Fees for Technical Services (FTS) under the India and Germany tax treaty.

The Assessing Officer (AO) held that since the duration of the stay in India of the taxpayer's technicians exceeded six months, the taxpayer had a PE in India under Article 5(2)(i) of the tax treaty. Accordingly, the receipts were liable to be assessed in accordance with the provision of section 44DA of the Income-tax Act, 1961 (the Act) or as 'business profits' under Article 7 of the tax treaty. The Dispute Resolution Panel (DRP) upheld the order of the AO that the taxpayer had a PE in India.

On appeal, the Income-tax Appellate Tribunal held that the supervisory activities of the taxpayer do not constitute a PE in India based on, inter alia, the following:

- To constitute a 'fixed place of business', the foreign enterprise must have at its disposal certain premises or a part thereof.
- In the present case, the taxpayer does not own or operate project sites independently, but rather such sites were provided by its Indian companies under the contractual obligations. Hence, it cannot be said that the taxpayer had a fixed place of business for its supervisory activities.
- As per Article 5(2)(i) of the tax treaty, supervisory activities by themselves cannot constitute a PE since the activities are required to be in connection with a building, construction or assembly activity of the non-resident. In the instant case the activities are not covered under Article 5(2)(i) of the tax treaty as the taxpayer does not have any building site or construction site of its own.
- The activities being technical in nature, it would fall within the ambit of FTS under Article 12 of the tax treaty and are taxable at the rates specified therein.

M/s. GFA Anlagenbau Gmbh vs. ADIT (ITA Nos. 1292/Hyd/2011, 1293/Hyd/2011, 1649/Hyd/2010, 1294/Hyd/2011, 2226/Hyd/2011, 1274/Hyd/2012)

Tribunal deletes Section 40(a)(ia) disallowance for short deduction of tax, channel placement fee payment by NGC Networks to cable TV operators not 'royalty' for Assessment Year 2009-10 to trigger Section 194J TDS provision

The taxpayer paid a channel placement fee of INR71.8 million to the cable operators/DTH providers for placing its channel in a particular frequency to get better viewership on account of good picture and sound quality. The taxpayer deducted tax at source at the rate of 2 per cent under Section 194C of the Act for the aforesaid payment. The AO was of the view that the payment for placement of the taxpayer's channel was in the nature of royalty under Explanation 2 to Section 9(1)(vi) of the Act. Thus, the AO held that tax should have been deducted under Section 194J of the Act. The DRP held that the channel placement fee did not come within the ambit of 'royalty', and thus Section 194J of the Act was inapplicable.

The Mumbai Tribunal held that though there is an amendment in the provision, and though according to newly inserted Explanation 6 with retrospective effect the term process has been defined and it includes transmission, uplinking and down linking of signals etc., the said retrospective amendment cannot be pressed into service for the purpose of disallowance under Section 40(a)(ia) of the Act. Because at the relevant time when the taxpayer had deducted the tax at source, this amendment was not in the statute.

The Tribunal held that when the taxpayer deducted the tax based on the provisions of Section 194C of the Act which is a bonafide decision by the taxpayer, keeping in view the nature of payments and facts of the

case then, the taxpayer was not supposed to foresee the subsequent retrospective amendment in the statute to be held liable to tax deduction at source under the provisions of Section 194J of the Act.

The Tribunal referred to co-ordinate bench ruling in Channel Guide India Limited v. ACIT [2012] 139 ITD 49 (Mum) and Ahmedabad Tribunal ruling in Sterling Abraive Ltd. v. ACIT [2011] 44 SOT 652 (Ahd). The Tribunal also relied on the decision of Calcutta High Court in the case of CIT v. S.K. Tekriwal [TS-902-HC-2012(CAL)] wherein it was held that in the case of shortfall in deduction of tax, disallowance under Section 40(a)(ia) of the Act is not warranted.

NGC Networks (I) Pvt. Ltd. vs. ACIT [TS-415-ITAT-2014(Mum)]

Tribunal allows expenditure incurred for brand building of 'Nirvana' by taxpayer (jewellery manufacturer cum exporter) as revenue, admissible under Section 37(1) of the Act

The taxpayer is a manufacturer and exporter of jewellery. For AY 2009-10, the taxpayer claimed expenditure incurred for brand building for a jewellery brand, Nirvana. However, the AO disallowed the taxpayer's claim. The said disallowance was upheld by CIT(A).

The Mumbai Tribunal allowed the expenditure incurred for brand building of Nirvana by the taxpayer as revenue, being deductible in accordance with the provisions of 37(1) of the Act. The Tribunal observed that the predominant character of expenditure being advertisement campaign, this expenditure was incurred for purposes of business, not resulting in acquisition of any capital asset or any profit-making apparatus. The Tribunal also held that merely debiting expenditure in books towards brand building and a statutory recognition being accorded to such an intangible asset as a 'brand' would not by itself imply that an advantage in capital field had arisen. The Tribunal also rejected the tax department's contention that expenditure was in capital field in the absence of data showing any brand value coming into existence, in terms of brand equity or loyalty, leading to increased customer base or any price premium.

Fine Jewellery (India) Ltd. v. ACIT [TS-371-ITAT-2014(Mum)]

Bangalore Tribunal concluded that reopening completed assessments under Section 153C of the Income-tax Act and making reference to transfer pricing is invalid when no incriminating material is found during search

During assessment proceedings under Section 143(3) for AY 2009-10, according to the taxpayer the AO did not make a reference to TPO for determination of ALP of international transaction and concluded the assessment. Aggrieved by the order of the AO, the taxpayer preferred an appeal before the CIT(A) and the Tribunal. Subsequently, during the course of proceedings under Section 153C, the AO made a reference to the TPO for determination of ALP of international transactions. The TPO proposed transfer pricing adjustment and the DRP confirmed the same.

The taxpayer contended that the DRP had failed to issue directions within the period of nine months from the end of the month

FICCI

in which the draft assessment order is served on the taxpayer, and that the DRP order was time barred as the directions were issued to the AO on 4 September 2012 and the time limit for issuance of directions by DRP had expired on 31 August 2012. The taxpayer also contended that the reference to the TPO was not valid as there was no incriminating material found during the search which was related to TP for non-abated assessments.

The Tribunal held as follows:

Validity of DRP directions - Rejected the contention of the taxpayer observing that there were several hearings which had taken place before 16 August 2012 and therefore, it was possible for the DRP to issue directions on 16 August 2012. The Tribunal held that directions are forwarded to the taxpayer only on principle of natural justice and such issuance of direction does not give rise to any cause of action. Further, the taxpayer's argument that dispatch of DRP direction on the taxpayer is immaterial and what is contemplated under Section 144C of the Act as the issue of directions to the AO is 'too technical'. The Tribunal referred to DRP Rules, 2009 and observed that the rules indicate that the first directions must be issued and later on should be communicated to the eligible taxpayer and the AO.

Whether the final assessment order passed was barred by limitation – The assessment order under Section 153C was barred by time limitation as the actual order was passed on 29 October 2012. However, in accordance with Section 153B, the assessment needed to be completed on 31 December 2011.

Validity of reference to TPO - Legislature has brought about a single assessment concept in place of dual assessment contemplated under Chapter XIV-B with the introduction of Sections 153A, 153B, 153C and 153D of the Act. Pending assessment during the proceedings under Section 153A or 153C of the Act will abate and only single assessment is to be made both for disclosed and undisclosed income. The assessments made under Section 153C for the AYs 2003-04 to 2006-07 were invalid as the assessment proceedings for those years had already attained finality and no incriminating material pertaining to transfer pricing adjustment was discovered in the search.

Validity of DRP's direction in respect of AMP expenditure - DRP is empowered to take cognizance of any new issue observed during the course of proceedings under Section 144C(8) of the Act.

The Himalaya Drug Company v. DCIT (ITA Nos. 1634 to 1639/Bang/2012)

Notification & Circulars

Central Board of Direct Taxes revises monetary limit for the appeal before Tribunal/ High Court/ Supreme Court

Central Board of Direct Taxes (CBDT) vide its Instruction No 5/2014 dated July 10, 2014 clarifies as follows:

- The revised monetary threshold limit for Tribunal appeal is INR0.4 million; for High Court appeal it is INR1 million; and for Supreme Court appeal is INR2.5 million. Such revised threshold limit would be applicable to appeals filed on or after 10 July 2014.

FICCI

- Appeal should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed above. Filing of appeal in such cases is to be decided on merits of the case.

- 'Tax effect' means the difference between the tax on the total income assessed and the tax that would have been chargeable after reduction of income in respect of disputed issues.

- However, tax will not include any interest thereon, except where chargeability of interest itself is in dispute.

- In cases where returned loss is reduced or assessed as income, the tax effect would include notional tax on disputed additions.

- In the case of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against.

- However, in the case of a composite order of any appellate authority, which involves more than one AY, an appeal shall be filed in respect of all such AYs even if the 'tax effect' is less than the prescribed monetary limits in any of the year(s).

- If, due to less than monetary threshold tax effect, an appeal is not filed, it cannot be inferred that department implicitly accepted the decision of the Tribunal/Court. Such cases shall be maintained by CITs in the judicial folder for their evidentiary value.

- Issues of constitutional validity of Act/Rule, ultra vires of Notification/Instruction, shall be contested on merits notwithstanding the fact that tax effect is less than monetary threshold.

- Cases where tax effect is not quantifiable or not involved, like registration of trusts or institutions under Section 12A shall not be governed by the prescribed limits, but by their merits.

CBDT Instruction No 5/2014 dated July 10, 2014

II. SERVICE TAX

Tribunal Decisions

Services received by parent entity located abroad from overseas Computerised Reservation System companies cannot be liable to service tax under reverse charge mechanism in India

British Airways, United Kingdom ("BA UK") had entered into contract with certain overseas Computerised Reservation System ("CRS") companies for maintaining global database regarding their flight schedules, fares, etc. on real time basis and centrally made payments to such CRS companies for their services. The taxpayer, a branch office of BA UK, appointed various International Air Transport Association ("IATA") registered travel agents for selling air tickets to ultimate passengers by using services of CRS companies and remitted the net earnings to BA UK. The Revenue Authorities demanded service tax from taxpayer as a recipient of CRS Companies services under the reverse charge mechanism. Accordingly, the taxpayer preferred the current appeal.

The taxpayer argued that it is a distinct entity than BA UK which consumes the services. Further, neither the taxpayer nor its IATA agents have contracted for availing services of CRS companies nor have they made any payment for such services. Accordingly, BA UK, is the service recipient, since the services are provided on its instructions, it is obliged to make payment and its need is satisfied. It was also argued that since the services of CRS companies enable travel agencies to access the computer system and data base of BA UK, their services are not Online Information Database Access or Retrieval Services ("OIDAR") but is an e-commerce transaction as per circular dated July 9, 2011. The taxpayer also argued the matter on principles of revenue neutrality.

The Revenue Authorities contended that since BA UK was granted permission by RBI to operate in India, the taxpayer's entity was formed and was instrumental in receiving the services of CRS companies to fulfil BA UK's objectives under the contract with CRS companies. Therefore, the taxpayer and BA UK are essentially one and the same. Further, without receiving the services of CRS companies, the activities of the IATA agents could not be carried out and also that the taxpayer is making payments to BA UK by settling its accounts with it.

The matter came up for consideration before a Delhi bench (of three members) of Customs, Excise and Service Tax Appellate Tribunal ("CESTAT"). All the three members of the bench held that the services of the CRS companies are in nature of OIDAR services. However there were divergent views within the members as to whether BA UK and the taxpayer are two separate establishments/ persons or not and consequently, the matter was referred to third member.

The third member held that permanent establishments in India are required to be treated as separate persons as per section 66A and accordingly the taxpayer cannot be treated as recipient of service. Given that BA UK made payments to CRS companies for services provided, the taxpayer by no stretch of imagination can be held to be lia-

ble to pay tax. Further, the service provided by CRS companies are consumed in UK only in as much as the server provided by CRS companies to IATA Travel agents are connected between two of them and such services are being utilized by the Travel agents. Given that, the service tax being a destination and consumption based tax, the tax liability cannot be raised against the non-consumer of service, i.e. taxpayer. Accordingly, the appeal was allowed in favour of the taxpayer

British Airways vs CCE [2014 TIOL 979 CESTAT DEL]

Date of export invoice would be the relevant date to reckon the time limit for filing a refund claim under rule 5 of CCR

The taxpayer was engaged in export of services and had filed a refund claim for unutilized CENVAT Credit as per rule 5 of CCR read with notification no 5 / 2006 – Central Excise dated March 14, 2006 ("Refund Notification"). The taxpayer was denied partial amount of refund for reasons that it was barred by limitation and certain input services had no nexus with output services. Accordingly, the taxpayer preferred an appeal before Mumbai CESTAT *interalia* contending that since the Refund Notification does not prescribe the relevant date for computing time limit as per section 11B, it should be computed from the date of receipt of consideration for export or at the least should be computed from the last day of quarter to which the refund claim pertains.

The Revenue Authorities argued that the said issue had already been examined by Madras HC in CCE Coimbatore vs GTN Engineering (I) Ltd. [2012 (281) ELT 185]. Further, it was argued that Refund Notification specifically requires submission of refund claim before expiry of the period as prescribed under section 11B and that such condition for grant of refund should be strictly adhered to and hence the date of export of service should be regarded as relevant date.

The matter came up for consideration before the Mumbai bench of CESTAT which decided the case in favour of Revenue. The CESTAT observed that that as per said Refund Notification, refund claim has to be filed before the expiry of one year from the relevant date. While the refund notification does not prescribes relevant date in case of export of service, it was observed that relevant date should be computed from the date of export of service since export takes place at the time of issuing invoice. Thus, CESTAT held that date of issuance of invoice would be relevant date and not the date of receipt of payment

Affinity Express India Private Limited vs Commissioner Central Excise, Pune I [2014 TIOL 1035 CESTAT MUM]

Adjustment of excess / short payment of services is allowable in the same six monthly period

The taxpayer is engaged in the business of providing mobile as well as landline telephone services. On investigation, jurisdiction excise officers found that there is a short payment of service tax in the return filed for the period April 2005 to September 2005 and that the taxpayer has availed CENVAT Credit on certain ineligible services and accordingly issued a show cause notice

and was adjudicated wherein the above mentioned demands were confirmed. The taxpayer preferred an appeal before the Commissioner (Appeals) wherein the demand on account of short payment of service tax was upheld, but the amount of alleged CENVAT Credit was allowed to the taxpayer. Being aggrieved, the taxpayer preferred an appeal before the CESTAT. The Revenue Authorities also preferred an appeal against the order holding CENVAT Credit as allowed to the taxpayer. Accordingly, both the appeals were merged and heard together by CESTAT.

The matter came up for consideration before the Delhi bench of CESTAT, wherein it was observed that since the taxpayer was not very often able to pay service tax on actual collections; service tax was paid on estimated amount of collection. Consequently, such amount of service tax paid on an estimated basis could be in excess or less than actual service tax liability. Further, where the taxpayer has paid excess service tax, the same does not mean that such service tax was collected from the customers. Accordingly, the CESTAT held that there is no reason to disallow adjustment of excess payment of service in a particular month against the short payment of service tax in another month and allowed the appeal filed by the taxpayer. As regards the CENVAT Credit, the CESTAT upheld the availability of such credit holding that alleged services qualify as input services and therefore dismissed the appeal filed by the Revenue Authorities.

Bharat Sanchar Nigam Limited vs CCE Raipur [2014 VIL 124 CESTAT DEL ST]

Procedural compliance is mandatory for availing CENVAT Credit

The taxpayer availed CENVAT Credit on the basis of extra copy/ photocopy of duty paid documents and invoices. However, such credit was denied by the Revenue Authorities on the ground that the documents based on which credit has been availed were not specified under Central Excise Rules, 1944 ("Excise Rules"). Accordingly, the taxpayer preferred an appeal before the Commissioner (Appeals), which upheld the denial of CENVAT Credit on the ground specified by Revenue Authorities.

The matter came up for consideration before the Mumbai bench of CESTAT which held against the taxpayer. The CESTAT observed that CENVAT Credit scheme adopted and operationalized in India is based on the tax credit method which relies upon sanctity of the documents. There are certain specific documents prescribed for availing credit. If such documents are not submitted, there is no vested right accruing to the taxpayer for availing credit. The CESTAT placed reliance on the SC's pronouncement in case of Hari Chand Sri Gopal [2010 (260) ELT 3 (SC)] and Indian Oil Corporation Limited [2012 (276) ELT 145 (SC)] and held that in order to claim benefit under the law, substantial compliance is not enough, prescribed procedures in the statute should be mandatorily followed and thus such cases shall prevail over the cases relied by the taxpayer. Accordingly, the appeal of taxpayer was dismissed

Century Rayon vs Commissioner of Central Excise, Thane –I [2014 TIOL 1165(CESTATMUM)]

In absence of marketing / promoting element, the activity of selling goods on another's behalf is not Business Auxiliary Services ("BAS")

The taxpayer is a Public Sector Undertaking engaged in the business of purchasing Compressed Natural Gas ("CNG") from Mahanagar Gas Limited ("MGL") and selling the same to ultimate consumers. The taxpayer entered into agreement with MGL to setup retail outlets for supply and sale of CNG. Under the agreement, the taxpayer was required to open and operate retail outlet for sale of CNG and interalia provide MGL with adequate space to install the required machinery / equipment to compress the CNG supplied to outlets, through pipelines. MGL registered such retail outlets for payment of excise duty. However, the taxpayer was required to undertake operation of such outlets and manage approvals and payment of local taxes. In this backdrop, the Revenue Authorities alleged that activities of the taxpayer are in relation to marketing of goods thus covered under BAS and demanded service tax along with applicable interest and penalties on the trade margin earned by the taxpayer. However, the taxpayer contended that they were engaged in purchase and sale of CNG on a Principal to Principal basis and there is no provision of service. However on adjudication, the demand was confirmed and being aggrieved, the taxpayer preferred the present appeal.

The matter came up for consideration before the Mumbai Bench of CESTAT which decided the case in favour of the taxpayer. The CESTAT observed that taxpayer were buying goods from MGL and therefore the question of rendering service of marketing of goods does not arise. Further, MGL was also discharging VAT / CST liability on CNG sold to the taxpayer. The CESTAT also observed that although the Retail Sale Price ("RSP") was fixed, it would not mean that the profit margin could be construed as commission for rendering services. Also, the taxpayer has not received any separate commission for selling CNG from retail outlets. Thus, the CESTAT held that since the transactions were done on principal to principal basis, it could not be presumed that taxpayer was rendering service to MGL. Reliance was placed on the case of Bhagyanagar Gas Limited [2013 (291) ELT 75], wherein it was held that mere mention of trade margin as commission in the agreement on which VAT / CST had been paid, would not evidence the fact of rendering service. Accordingly, CESTAT allowed taxpayer's appeal.

Bharat Petroleum Corporation Limited vs Commissioner of Service Tax [Order No A/828-830/14/CSTB/C-I] [TS 246 Tribunal 2014 ST]

Assistance provided to client relating to its business is not 'management consultancy service' and thus not liable to service tax

The taxpayer was engaged in the business of manufacturing and selling MS Ingots. Additionally, the taxpayer also undertook other non-manufacturing activities such as helping its customers in marking of granite blocks and rendering assistance in execution of export orders, for which it received commission. Accordingly, the Revenue Authorities alleged that the said assistance provided by the taxpayer to its clients for commission is covered under the taxable service category of Management Con-

sultancy Services ("MCS") and liable to service tax. Upon adjudication, the Revenue Authorities demanded such service tax along with applicable interest and penalties. Being aggrieved the taxpayer preferred the present appeal.

The matter came up for adjudication before the Delhi bench of CESTAT which allowed the taxpayer's appeal. The CESTAT observed that the definition of MCS covers services provided in relation to the management of an organization and includes advice, consultancy assistance provided for rectification or improvement of system of the organization. Merely assisting a client in executing export orders or in marking granite blocks is not covered under MCS, since there is no element of any consultancy with the objective of management, rectification or improvement of the working system of an organization. Accordingly, CESTAT allowed taxpayer's appeal and held that taxpayer's activity as not taxable under MCS

Pushkar Steels Private Limited vs Commissioner of Central Excise, Meerut [TS 218 Tribunal 2014 ST]

Service tax not imposable on value of goods involved in contract execution

The taxpayer is engaged in supply, erection, commissioning and installation of lifts and elevators. The taxpayer was discharging applicable service tax on 20 percent of total contract value of erection, commissioning and installation and was not discharging service tax on the value of goods as per notification no 12/2003 dated June 20, 2003. However, the Revenue Authorities issued a Show Cause Notice ("SCN") proposing to reclassify their service under 'works contract service' ("WCS") and denying benefit of exemption under notification no 12/2003-ST on the ground that the contract was indivisible. The Revenue Authorities also contended that taxpayer has not discharged VAT liability on actual value of goods and discharged service tax only on 20 percent of contract value. The taxpayer contended that its activity was not classifiable under WCS and further works contract composition scheme was an optional scheme and not mandatory. It was further contended that even assuming that its activity was a 'Works Contract', service tax was correctly being paid. In this regard, taxpayer submitted that rule 2A of Service Tax (Determination of Value) Rules, 2006 ("Service tax Valuation Rules") provides that 'value of works contract service determined shall be equivalent to the gross amount charged for the works contract less the value of goods transferred in execution of the works contract'. Taxpayer also submitted documentary evidence to illustrate that service tax liability had been discharged on actual basis.

The matter came up before the Mumbai Bench of CESTAT, wherein the CESTAT observed that the impugned order was unjustified in classifying the activity under works contract service and then imposing the composition scheme. It was held that service tax could not be demanded on the portion of value being the goods involved in execution of contract. Further, the CESTAT also noted from documentary evidences that taxpayer has paid VAT on the material components and held that the matter needed re-verification by Adjudicating Authority. Accordingly, matter was remanded for de novo adjudication

OTIS Elevator Company Ltd vs Commissioner of Service Tax [TS 245 Tribunal 2014 ST]

III. VAT/ CST/Entry Tax

High Court Decision

No penalty or interest leviable in the absence of a substantive charging section

The taxpayer, a proprietor, filed his returns and paid all applicable sales tax for the year 1984-85. Although the entire sales tax and the additional sales tax was paid, it was paid belatedly. In light of the late payment of tax, the Revenue Authorities sought to levy interest and penalty under section 24(3) of the Tamil Nadu General Sales Tax Act, 1959 ("TNGST") for late payment of additional sales tax. The taxpayer opposed such a levy on the ground that, in the absence of a charging section under the Tamil Nadu Additional Sales Tax Act, 1970 ("TNAST") no interest or penalty could be charged for belated payment of additional sales tax.

The matter reached before the Madras HC which held in favour of the taxpayer. The HC found that there was no charging section in the TNAST. Further, if the legislature intended that the entire gamut of provisions of the TNGST (which is the principal act to the TNAST) were to be applied to the TNAST, then it could have mentioned the same in the TNAST and all the provisions of TNGST could have been applied to this case by reference. Since there was no substantial charging provision in the TNAST itself for the levy of penalty or interest, the same cannot be extracted from TNGST. Accordingly, the ruling was given in favour of the taxpayer.

S Gurunathan vs Joint Commissioner [2014 VIL 162 HC Madras]

To qualify as sale of goods in the course of export, the contract / agreement should specify the goods

The taxpayer was a manufacturer of corrugated boxes. It sold its goods to Lucky Exports which received a purchase order from a foreign buyer for the supply of Refined Sunflower Oil. For such supply, Lucky Exports placed an order for corrugated boxes with the taxpayer. The corrugated boxes sold by the taxpayer were to be delivered to the packing unit at Vashi, Navi Mumbai. For the relevant assessment period, the taxpayer claimed such sale as sale in the course of export against Form H. The Revenue Authorities disputed this position and raised a demand against the taxpayer.

The matter came up for consideration before the Maharashtra Sales Tax Tribunal ("MSST") which held against the taxpayer. The MSST found that the contract of sale between the foreign buyer and Lucky Exports did not mention the supply of corrugated boxes supplied by the taxpayer. Further, the description of the packing material mentioned in the Bill of Lading did not tally with the supply of packing material mentioned in the contract. Therefore, the MSST reasoned that the goods contracted for export could not be said to have included the packing material and therefore the sale of packing material cannot be said to have been made after and for the purpose of complying with the agreement between the foreign buyer and Lucky Exports. Therefore, the MSST held the sale of corrugated boxes

by the taxpayer to Lucky exports cannot be said to be a sale in the course of export. Accordingly, the appeal of the taxpayer was rejected as the sale was held to be a sale within the state of Maharashtra

United Paper Industries vs The State of Maharashtra [2014 VIL 03 MSST Mumbai]

IV. CUSTOMS

Tribunal Decisions

Larger Bench settles Special Additional Duty refund controversy, invoice endorsement held not mandatory

The taxpayer is a trader engaged in import and subsequently selling such goods in India. The taxpayer has sold such goods under a commercial invoice discharging applicable VAT / CST, however it has failed to separately mention Special Additional Duty ('SAD') amount on the invoice and also failed to declare that credit of SAD is not admissible on such invoice. The taxpayer subsequently applied for claiming refund of SAD as per notification No 102/2007, however, the Revenue Authorities denied the refund on the ground that since no duty element has been included in the invoice, the tax payer cannot get refund.

The taxpayer placed reliance on various decisions arguing that substantive benefit cannot be denied on the basis of procedural infraction. On the other hand, Revenue Authorities placed reliance on various judicial precedents and submitted that conditions of an exemption notification should be strictly followed for grant of refund.

The matter came up for consideration before the Mumbai bench of CESTAT which held the decision in favour of the taxpayer. The CESTAT discussed the objective regarding the introduction of SAD. Further, the CESTAT observed rule 9 of CCR, which prescribes various details required to be disclosed on an invoice for availing CENVAT Credit and held that if a commercial invoice does not indicate the amount of duty, the question of availing credit of such duty does not arises at all. CESTAT further relied on various rulings wherein it was held that refund cannot be denied for an infraction of a procedural / technical nature and ruled the matter in favour of the taxpayer

Chowgule and company vs CCE [Appeals No C/18 to 20/2010(Mumbai CESTAT)]

SAD refund allowed on drugs imported in kilograms and sold in grams

The taxpayer was engaged in the business of importing bulk drugs namely Methyl Predenisolone, Hydrocortisone in 1 kg package and subsequently selling them to domestic customer. Accordingly, the taxpayer claimed refund of SAD on the basis of bills of entries filed during import. The Revenue Authorities sanctioned the refund claim holding that it had fulfilled all the conditions of notification No 102/ 2007-customs. However, aggrieved by such order, the Revenue Authorities preferred an appeal before Commissioner (Appeals), which reversed the adjudicating order and denied

the refund. Hence, the taxpayer preferred the present appeal.

The taxpayer primarily contended that the goods subsequently sold were the same which were imported and hence rejection of refund claim was improper. Reliance was placed on SC's ruling in case of Aero Pack Products [2009 (238) ELT 385 (SC)] wherein it was specifically held that where repacking from bulk to a form suitable to customer, no new product emerges and no manufacturing activities arises. On the other hand, Revenue Authorities submitted that the imported goods were repacked by the taxpayer in smaller packs, thus there was packing / repacking of goods and the same were sold per gram. Further, the Revenue Authorities contended that for claiming SAD refund, the imported articles should be sold as such, without changing in its identity.

The matter came up for consideration before Ahmedabad of CESTAT, which rejected the Revenue Authorities contention by holding that the product description in the sale invoice and the imported products were exactly the same. There was mere mismatch as to the packing of the imported goods in comparison to the goods subsequently sold, but the total quantity was correctly indicated as sold through unit price or rate as indicated in grams. The CESTAT observed that the notification only envisages sale of imported goods whether in same form or after repacking. The CESTAT relied on Gujarat HC pronouncement in case of Posco India Delhi Steel Processing Centre Private Limited [2012 (285) ELT 410 (Tri Ahmd)] holding that the process of cutting and slitting would not amount to manufacturing since the identity of imported goods is not lost and merely change in tariff head does not ipso facto make the imported goods a new article with distinct name or character. The CESTAT in light of the law laid down by Gujarat HC held in favour of the taxpayer.

Nexus Pharmachem Pvt Ltd vs CC, Ahmedabad [TS 228 Tribunal 2014 Customs]

V. CENTRAL EXCISE

Tribunal Decisions

Charges for pre delivery inspection conducted at the instance of the buyer not includable in the assessable value of the goods

The issue before the Ahmedabad Bench of CESTAT was whether the pre-delivery inspection ('PDI') charges incurred only at the instance of the buyer are includible in the assessable value as per section 4 of the Central Excise Act, 1944 ('CEA') or not. The taxpayer contended that occasionally, some of the government buyers impose a condition that the goods should again be tested from an approved laboratory before the same were lifted from the taxpayer's factory.

The CESTAT relied on the decision of the SC in the case of Collector of Central Excise vs CIMMCO Limited [1996 (84) ELT 67] wherein it was held that inspection charges incurred by the customers are not includable in the assessable value especially when the taxpayer has a full-fledged quality assurance department. The CESTAT also found that such charges although initially paid for by the taxpayer were later reimbursed by the buyer. Accordingly, the appeal of the

Revenue Authorities to include the pre-delivery inspection charges at the instance of the buyer was rejected

Commissioner of Central Excise vs Luby Submersibles [2014 TIOL 1077 CESTAT Ahmedabad]

Land beneath which pipelines are laid not to be considered as precincts of the factory

The taxpayer was engaged in the manufacture of motor spirit, high speed diesel and liquid petroleum gas and operated through their Madhya Pradesh refinery. They possessed valid registration for their refinery / factory and applied for an amendment in registration seeking to include various parts of the land areas in and around the factory under which the pipelines were laid down for transporting the crude oil. The Revenue Authorities rejected the application on the ground that transportation of crude oil was not integral to the manufacturing activity of the taxpayer.

The matter reached before Delhi Bench of CESTAT which held against the taxpayer. The CESTAT reasoned that although section 2(e) of the CEA defines the factory to be inclusive of its precincts, the land under which pipelines (which run into hundreds of kilometers) are laid down, cannot be said to be precincts of the refinery. Further, to allow the registration of such land would also mean allowing the road area for transportation of raw material by a truck. Accordingly, the appeal of the taxpayer was rejected

Bharat Oman Refineries vs Commissioner of Central Excise, Bhopal [Appeal no E/ 2620/ 2011/ EX CESTAT New Delhi]

Intimation to Revenue Authorities about shifting manufacturing unit sufficient; no penalty imposable

The taxpayer was engaged in the manufacture of footwear and had factories at two locations, viz Bhiwadi and Agra. Pursuant to a merger, the taxpayer decided to move its entire factory along with the machinery, capital goods, inputs, finished goods from Bhiwadi to Agra. The Revenue Authorities contended that the taxpayers transferred stock of finished footwear and additive to Agra in contravention of the Excise Rules and CENVAT Credit Rules, 2004 (“CCR”). Further, after intimating the Revenue Authorities of this transfer, they did not wait for the permission to be granted for the same. Therefore, for these reasons, the taxpayers were liable to pay penalty.

The matter reached before the Delhi Bench of CESTAT Delhi which held in favour of the taxpayer. The CESTAT reasoned that the taxpayer filed due intimation with the Revenue Authorities for the removal of inputs, capital goods and other finished goods. Further, the Revenue Authorities did not bring on record any provision of law which mandated the taxpayers to wait till the permission was granted to them. Moreover, the Revenue Authorities were free to check the inventory and other details at the time of filing of the intimation letter. Therefore, it was held that the Revenue Authorities did not have a valid case to present

Tej International Private Limited vs Commissioner of Central Excise [2014 TIOL 1122 CESTAT Delhi]

Two factories having common facilities not be considered as separate registrations

The taxpayer was a manufacturer of paper and paper board chargeable to excise duty. In 1994, it made a declaration to the Revenue Authorities that it had set up another factory for the manufacture of the same goods. Consequently, they applied for a separate excise registration for the second factory. According to notification no 47 / 1997- central excise, they were availing exemption on both the factories. Later in 2001, investigations began to ascertain whether the two factories claiming exemption were actually separate factories.

On investigation, the Revenue Authorities found the following:

- Both the factories were located within the same compound wall and there was no boundary wall separating the two units;
- There was common electricity supply for both the units;
- There was a common boiler for generation of steam;
- There was common space for storage of raw material;
- There was common mechanical workshop and electrical workshop;
- They shared the common pump house and water tank; and
- There was a common foam tank, common hypo plant and common lime mud washer, primary clarifier, and effluent treatment plant.

The above facts led the Revenue Authorities to contend that the two factories did not deserve two separate excise registrations and therefore, the benefit of exemption could not be claimed twice. On the basis of this contention, they issued demand notices to the taxpayer.

The matter came up for consideration before the Delhi Bench of CESTAT which held against the taxpayer. On the basis of the findings of the Revenue Authorities, the CESTAT reasoned that the two units of the taxpayer were intricately interlinked. Given that they both used common facilities, common workers etc., it could not have been said that they qualified as separate factories. In fact they were two units of the same factory. Accordingly, in terms of the decision of the SC in the case of Dhampur Sugar Mills vs Commissioner of Central Excise [2007 (216) ELT A23 (SC)], the CESTAT held in favour of the Revenue Authorities

Commissioner of Central Excise vs Mukerian Papers Limited [2014 TIOL 1124 CESTAT Delhi]

Although no time prescribed for availing credit, reasonable time to avail credit to be 1 year

The taxpayer was a manufacturer of craft paper and availed excise duty exemption

vide notification no 6 / 2002 dated March 1, 2002. It did not avail any CENVAT Credit during the years of production, however, after a lapse of 5 years it availed CENVAT Credit on inputs used in the manufacture of exempted goods. Disallowing the CENVAT Credit, the Revenue Authorities issued a notice after 2 years from the date of availment to demand duty along with interest and penalty. The taxpayer on the other hand opposed the notice saying the same was time barred as it was not issued within one year.

The matter reached before the Mumbai Bench of CESTAT which allowed the claim of the Revenue Authorities. The CESTAT reasoned that as per the CCR, the credit of duty paid on inputs is required to be taken immediately. Although the rules do not lay down any time limit, it is a settled position that reasonable time limit has to be read into law. Since the taxpayer did not follow this time limit, the denial of CENVAT Credit could not be defaulted. Further, to be eligible for credit, the goods should be dutiable. Since the goods produced by the taxpayer were not dutiable, the manufacturer was not eligible to avail any credit. Therefore, the claim of the Revenue Authorities in denying the credit and demanding duty along with interest was held to be sustainable.

Shayona Pulp Conversion Mills Private Limited vs Commissioner of Central Excise Aurangabad [Appeal no E / 44 / 2009 CESTAT Mumbai]

Notification & Circulars

Delhi Value Added Tax (Second Amendment) Rules, 2014 notified

Delhi Government notifies Delhi Value Added Tax (Second Amendment) Rules, 2014 effective from the date of publication in Delhi Gazette. Such rules inter-alia prescribe revised fees for filing memorandum of appeal, amends VAT Returns viz DVAT-16 and DVAT-17 (composition dealers) requiring quarter-wise details of Purchases / Inward branch transfers made in preceding tax period but received in current period

Notification No F 3(2)/Fin(Rev-I)/2014-15/dsVI/605 dated June 17, 2014

VAT applicable on the printed material provided by computer institutes

Delhi Government clarifies that VAT at the rate of 5 percent leviable on sale of printed material by computer institutes for education purposes as the said product classifiable as 'printed material' in the entry No 52 of Third Schedule to Delhi Value Added Tax Act

Determination Order No 363/CDVAT/2014/265 dated June 23, 2014

Period for duty concession on automobiles, capital and consumer goods used in manufacture of electrically operated vehicles and hybrid motor vehicles, extended

Central Government extends the time limit for duty concession available on automobiles, capital and consumer goods used in production of electrically operated vehicles and Hybrid Motor Vehicles till December 31, 2014 (earlier such concession was avail-

able upto June 30, 2014); Amends Notification No 12/2012-CE dated
March 17, 2012

Notification No 6/2014 – Central Excise dated June 25, 2014

"This newsletter has been prepared with inputs from KPMG and BMR & Associates and does not express views or expert opinions. The newsletter is meant for general guidance. It is recommended that professional advice be sought based on the specific facts and circumstances. This newsletter does not substitute the need to refer to the original pronouncement"